OMAR BIN HAJI JAAFAR
v.
PUBLIC PROSECUTOR.

[Court of Appeal (Mathew, C.J., Abbott and Buhagiar, JJ.) July 11, 1952]

[Kuala Lumpur — Criminal Reference No. 1 of 1952]

Sheraiah Courts Enactments of Kedah, s. 28 — Whether this section so far it relates to assessors is still in force — Courts Ordinance, 1948 — Federation of Malaya Agreement, 1948, clauses 5, 66 and 100 — Power to legislate matters relating to Muslim law or Malay custom.

This was a reference under section 34 of the Courts Ordinance, 1948 on a certificate by the Public Prosecutor to the effect that the determination of the appeal in this matter (reported at page 94 ante.) involves a point of law which it is desirable in the public interest to have determined by the Court of Appeal, i.e., "Whether section 28 of the Sheraiah Courts Enactment of Kedah so far as it relates to assessors is still in force."

The learned Judge in the lower Court held that the provisions of section 28(2) of the Sheraiah Courts Enactment have been impliedly repealed on the coming into force of the Courts Ordinance, 1948.

On hearing of this reference counsel for the Public Prosecutor submitted that there is a presumption against repeal by implication.

Held, that there was nothing in the provisions of section 28 of the Sheraiah Courts Enactment of Kedah which was inconsistent with or repugnant to the scheme of Courts established by the Courts Ordinance, 1948. The Legislature in repealing the various written laws relating to Courts had expressed a clear intention to keep such and similar provisions in force by excluding from the extent of the repeal "the provisions relating to the Courts of Kathis and Assistant Kathis and appeal therefrom."

Held further, that by virtue of clause 100 of the Federation of Malaya Agreement, 1948, the power to legislate matters relating to the Muslim Religion and Customs of the Malays is vested in the Legislative Council of the Malay States.

COURT OF APPEAL, reference by the Public Prosecutor on the decision of Briggs, J., reported at p. 94 *ante*.

B. J. P. Joaquim for the appellant.

T. V. A. Brodie (Solicitor General) for the respondent.

Cur. Adv. Vult.

The judgment of the Court of Appeal was delivered by :—

Buhagiar, J. : — This is a reference under section 34 of the Courts Ordinance, 1948 (Federation of Malaya Ordinance No. 43 of 1948) on a certificate by the Public Prosecutor to the effect that the determination of the appeal in the case between Omar bin Haji Jaafar and the Public Prosecutor, being an appeal from the decision of the Magistrate's Court at Alor Star in a criminal matter, involves a point of law which it is desirable in the public interest to have determined by the Court of Appeal, namely the following point :—

Whether section 28 of the Sheraiah Courts Enactment of Kedah so far as it relates to assessors is still in force.

Section 28 of Enactment No. 109 (Sheraiah Courts) of Kedah is as follows :—

"28. (1) The Court of a Kathi or Assistant Kathi shall have power to try all offences under this Enactment other than offences against the provisions of sections 15, 16, 17, 18, 19, 20 and 23 and to impose any sentence herein authorised, provided that offences against the provisions of sections 8, 9 and 24 shall be triable by the Chief Kathi only.

(2) Offences against the provisions of sections 15, 16, 17, 18, 19, 20 and 23 of this Enactment shall be triable by any Court having jurisdiction according to the provisions of Enactment No. 25 (Courts) provided that such Court shall try such offences with the aid of two assessors as hereinafter provided.

(3) The assessors referred to in sub-section (2) above shall be chosen from a list of Mohammedans of standing nominated by the State Council as proper persons to act as assessors for the purpose, or for the purpose of section 45 of Enactment No. 25 (Courts).

(4) The provisions of sections 128, 129, 130 and 131 of the Criminal Procedure Code with such modifications as may be necessary to make them consistent with this Enactment shall apply to the selection, summoning remuneration and discipline of such assessors.

(5) The function of assessors sitting with the Court under this section shall be to advise the Court in matters connected with Mohammedan Law."

The Court of a Kathi or Assistant Kathi referred to in the above section is the Sheraiah Court established by section 54 of Enactment No. 25 (Courts) of Kedah; this Enactment also established a Court of Appeal, a High Court (First and Second Divisions), Courts of Magistrates (First, Second and Third Class) — vide section 3. Section 55 of this Enactment determines the jurisdiction in criminal and civil matters of the Sheraiah Court; the criminal jurisdiction is that conferred by Enactment No. 109 (Sheraiah Courts).

Except for the provisions relating to the Courts of Kathis and Assistant Kathis and appeals therefrom, Enactment No. 25 (Courts) of Kedah was repealed by the Courts Ordinance 1948 (Federation of Malaya Ordinance No. 43 of 1948), which came into force on the 1st January, 1949. This Ordinance established a unified system of Courts with uniform civil and criminal jurisdictions throughout the Federation in substitution for those established under the various Enactments in force in the Malay States and the Settlements.

In his written judgment on appeal Biggs, J., held that the provisions of sub-section (2) of section 28 of Enactment No. 109 (Sheraiah Courts) have been impliedly repealed on the coming into force of the Courts Ordinance, 1948. He pointed out that before section 28 of Enactment No. 109 (Sheraiah Courts)

was amended in 1937, the assessors who were to sit with the Court of a Kathi or Assistant Kathi had, as far as relevant, rights, duties, and powers given by Chapters XIII and XIV of the Criminal Procedure Code to assessors of the High Court; the learned Judge was of the opinion that had these pre-1937 provisions been still in force when the Courts Ordinance, 1948, came into force, they would have been impliedly repealed because the conception of assessors whose opinions could control the verdict of a Magistrate's Court was repugnant to the scheme of Part VII of the Courts Ordinance, 1948; under sub-section (5) of section 28 of the said Enactment (as it now stands) the function of assessors sitting with the Court of a Kathi or Assistant Kathi is to advise the Court in matters connected with Mohammedan Law; although such assessors have no power to control the verdict of the Court, the learned appeal Judge was of opinion that the provisions dealing with assessors in section 28 were impliedly repealed.

On the hearing of this reference, Mr. Brodie for the Public Prosecutor submitted that the is a presumption against repeal by implication. "Repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory Enactments in the Statute Book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it is inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention." (*Maxwell* on *Interpretation of Statutes*, 9th. Ed. p. 173).

There is nothing in the provisions of section 28 of Enactment No. 109 (Sheraiah Courts) of Kedah which is inconsistent with or repugnant to the scheme of Courts established by the Courts Ordinance, 1948. On the contrary, the Legislature in repealing the various written laws relating to Courts has expressed a clear intention to keep such and similar provisions in force by excluding from the extent of the repeal "the provision relating to the Courts of Kathis and Assistant Kathis and appeals therefrom." Part VII of the Courts Ordinance, 1948, which establishes Magistrates' Courts without assessors did not introduce a new principle; this was also the situation in the case of Courts of Magistrates established under Enactment No. 25 (Courts) of Kedah.

Apart from the absence of any inconsistency or repugnancy between the provisions of section 28 of Enactment No. 109 (Sheraiah Courts) of Kedah and the Courts Ordinance, 1948, there is a strong presumption against the implied repeal of the said section 28 because of the provisions of Clauses 5 and 100 of the Federation of Malaya Agreement, 1948. Clause 5 provides that "except as provided in Clauses 100 and 101 of this Agreement, nothing in this Agreement (including the Schedules thereto) shall apply in any Malay States to matters relating to the Muslim Religion or the Customs of the Malays"; by virtue of Clause 100 the power to legislate on matters relating to the Muslim Religion and Customs of the Malays is vested in the Legislative Council of the Malay States. The said Enactment of Kedah deals with matters and with certain offences of a religious nature; section 2 thereof makes all persons professing the Mohammedan religion subject to that Enactment, and under section 28(5) the functions of assessors sitting with the Court in the trial of offences is limited to advise the Court in matters connected with Mohammedan Law. Subject to the provisions of Clause 66 of the Federation of Malaya Agreement, 1948, the validity of any law passed by the Legislative Council of the Federation of Malaya affecting or purporting to affect the Muslim Religion or the Customs of the Malays would be questionable.

For the above reasons we determine that section 28 of Enactment No. 109 (Sheraiah Courts) of Kedah, so far as it relates to assessors, is still in force.

Reference answered.

YAP KIM CHYE & ANOR.
v.
SEOW SENG CHOON.

[Orig. Civ. Juris. (Knight, J.) July 14, 1952]
[Singapore — Suit No. 616 of 1951]

Damages — General and special damages for the benefit of deceased's wife and children — Negligence — Stationary trishaw — Vehicle running into.

This was a claim based on the principle of res ipsa loquitur. The driver of a lorry belonging to the defendant was on the night of September 27, 1950 driving it along Victoria Street towards the Happy World when suddenly a figure ran in front of his vehicle from the right hand side. The driver immediately braked and swerved to the left — but not in time to avoid the pedestrian who was struck and knocked down. Thereafter the vehicle swerved to the left and ran into the back of a stationary trishaw in which the deceased was sitting near the pavement. The trishaw was carried a considerable distance by the violence of the impact and the deceased received multiple injuries from which he subsequently died.